IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO. 167 OF 2007
IN
SUMMARY SUIT NO. 09 OF 2007

M/s. Keppel Seghers Belgium NV. ... Plaintiff.

V/s.

Hindustan Dorr-Oliver Ltd. ... Defendant.

Mr. Kevic Setalwad i/b. M/s. D.H. Law for the Plaintiff.
Mr. Sharan Jagtyani with Mr. Ranjit Shetty i/b. M/s. PDS Legal for the Defendant.

CORAM : DR. D.Y. CHANDRACHUD,J.

18TH JUNE 2007.

P.C. :-

. An agreement was entered into between the Plaintiff and the Defendant on 8th December 2002 under which the Plaintiff was to supply at and for a consideration of Euros 151,800 equipment of the description specified in the agreement. A total of 10 invoices in the amount of Euros 151,800 were raised by the Plaintiff upon the Defendant (details whereof are furnished in paragraph 4 of the plaint). Five invoices were paid. A Suit for recovery of an amount of Euros 79.400 has been instituted on the basis of 5 invoices which remained due and outstanding.

2. In response to an E-mail addressed to the Plaintiff the Technical Manager of the Defendant by his communications dated 5th August 2004 and 19th August 2004, acknowledged that there was a delay due to unavoidable reasons in the payment of the amount due and agreed to an expeditious payment. However, in response to a notice of demand, the Defendants by a communication dated 27th January 2005 raised the defence inter-alia that the import content of the Electro-Mechanical Packages had exceeded what was agreed in the article 7 of the agreement and that as a result, the Defendant had been "out placed" in the market. The agreement between the parties dated 9th December 2002 was specifically in relation to a contractual agreement with MDL. The defence did not dispute that the necessary transfer of technology taken placed as envisaged in the agreement, for the purpose of the MDL agreement. The Defendant however, submitted that it has a counterclaim (which at that stage it did not seek to quantify) in respect of other contracts which it had not been able to secure. The Plaintiff by a letter dated 5th May 2005 inter-alia adverted to the acknowledgement of liability by the official of the

Defendant on 5th and 19th August 2004. In reply thereto, the Defendant in its communication dated 27th January 2005 did not dispute the authority of the officer to render the acknowledgement of liability but contended that the communication could not be read in isolation.

3. A Company Petition for winding up was instituted by the Plaintiff (Company Petition 764 of 2005) in which an order was passed by a learned Single Judge of this Court on 4th August 2006. The learned Single Judge, upon a submission made by the Defendant, ordered that a Bank Guarantee of a Nationalised Bank shall be furnished to secure the principal amount of the five invoices. Liberty was reserved to the Plaintiff herein to institute a suit. All the rights and contentions of the parties were kept open.

4. Three defences have been urged at the hearing. The first submission is that clause 9.1 of the agreement provides that the "agreement shall be governed by and all the rights and obligations which are required to be construed in accordance with the Swiss Laws." Hence, it has been submitted that in

breach of the governing provisions of clause 9.1 of the contract, the Plaintiff has chosen to institute a suit on the foundation that it would be governed by the Indian Law. In so far as the second and third defences are concerned it has been urged that :

(i) The Defendant has a counterclaim against the Plaintiff in respect of losses sustained as result of the import content of the components provided by the Plaintiff in pursuance of the contract;

(ii) That the officer of the Defendant who had acknowledged the liability due to the Plaintiff had no authority to do so.

5. The settled position in law is that foreign law is a question of fact which must be specifically pleaded by a party or parties relying upon it. It must be proved to the satisfaction of the Court like any either plea set up by the concerned party. The onus of proof of foreign law lies on the party relying upon it.(See **Hari Shankar Jain V/s. Sonia Gandhi** AIR 2001 SC 3689 paras 27 & 28). The Defendant has not even

prima facie demonstrated before the Court at the hearing of the Summons for Judgment what the Swiss law is on the subject. The plea before the Court is vague and completely lacking in particulars which a plea of fact must contain.

6. In so far as the merits are concerned, there is prima-facie, an admission of liability in the communications dated 5th and 19th August 2004 issued on behalf of the Defendant. Significantly in the letter dated 26th May 2005, the Defendants did not dispute the authority of the officer to issue the acknowledgement. The claim of the Defendant for damages is not a liquidated sum due. The claim has yet to be adjudicated and set forth.

7. Having regard to these circumstances, I am of the view that while the Defendants should in the interests of justice be granted an opportunity to defend the suit, this should be subject to condition.

8. The Defendant has furnished a Bank Guarantee as directed by a learned Single Judge in the order dated 4th August 2006 passed in the Company Petition. The

ends of justice would be served if a direction is issued that the guarantee be kept alive during the pendency of the suit. There shall be an order accordingly. The Plaintiff is not permitted at this stage to encash the Bank Guarantee.

9. The Defendant is granted leave to defend the suit, conditional on the Bank Guarantee furnished in pursuance to the order dated 4th August 2006 being kept alive during the pendency of the suit. The Summons for Judgment is accordingly disposed of.